Supreme Court, U.S.
FILED
NOV 12 1999
CLERK

(2)

No. 99-650

In The

Supreme Court of the United States

DAVIS, RENO & COURTNEY,

Cross-Petitioner,

v.

CITY OF WESTMINSTER, CHARLES V. SMITH, CRAIG SCHWEISINGER, TONY LAM, DON S. ANDERSON, JOHN T. DEMONACO, BRIAN MAYHEW, ROBERT HUNTLEY, CHARMAYNE BOHMAN AND RICHARD JONES, DON HERR, JOE WILSON and MICHAEL GARRISON,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO CROSS-PETITION

LESTER G. OSTROV
JAN G. LEVINE
Counsel of Record
FOGEL, FELDMAN, OSTROV
RINGLER & KLEVENS
A Law Corporation
1620 26th Street
Suite 100 South
Santa Monica, CA 90404-4040
(310) 453-6711

Attorneys for Cross-Respondents Don Herr, Joe Wilson and Michael Garrison

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19pp

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED 3

I. THE RULING THAT THE FEE AWARD SHOULD BE PAID DIRECTLY TO PLAINTIFFS IS CONSISTENT WITH VIRTUALLY ALL APPLICABLE AUTHORITIES, INCLUDING TWO DECISIONS OF THIS COURT 3

A. This Court Has Held Twice That Section 1988 Fees Vest In The Prevailing Party ... 3

B. Exceptions To The *Jeff D./Venegas* Rule Are Rarely Made In Section 1988 Cases, And There Is No "Conflict" Among The Circuits 5

C. DR&C's Cross-Petition Cites No Authority Which Conflicts With Precedents Holding That Section 1988 Fees Are To Be Paid To The Party, Not The Attorney 6

II. DR&C'S RELIANCE ON *JERRY M. LEWIS* IS MISPLACED AND DOES NOT PROVIDE A REASON FOR REVIEW BY THIS COURT 9

A. *Jerry M. Lewis* Arose under the False Claims Act, a Statute with an Entirely Different Purpose than the Fees Act 9

B. Even If *Jerry M. Lewis* Were Applicable To A Section 1988 Fee Award, The Facts Here Are Distinguishable 11

TABLE OF CONTENTS – Continued

Page

III. NONE OF DR&C'S REMAINING ARGUMENTS PRESENT A BASIS FOR THE GRANT OF THE CROSS-PETITION FOR CERTIORARI..... 13

A. DR&C Presents A Question For Review Which Was Never Raised In The Proceedings Below 13

B. DR&C's Final Argument Is Not Raised By The Questions Presented, Nor Was It Ever Raised Below 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Benitez v. Collazo-Collazo, 888 F.2d 930 (CA 1 1989) 5

Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) 7, 8

Brandenburger v. Thompson, 494 F.2d 885 (CA 9 1974) 8

Brown v. General Motors Corp., 722 F.2d 1009 (CA 2 1983) 4

Collins v. Romer, 962 F.2d 1508 (CA 10 1992) 5

Cooper v. Singer, 719 F.2d 1496 (CA 10 1983) 4

Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974) 8

Evans v. Jeff D., 475 U.S. 717, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986) ..... *passim*

Freeman v. B&B Association, 790 F.2d 145 (CA D.C. 1986) 4

Gilbrook v. City of Westminster, D.C. No. Cv 94 2051 2

Hensley v. Eckerhart, 461 U.S. 424 (1983) 7

Image Technical Service, Inc. v. Kodak, 136 F.3d 1354 (CA 9 1998) 5, 6, 10, 11

Jonas v. Stack, 758 F.2d 567 (CA 11 1985) 4

Miller v. Amusement Enterprises, Inc., 426 F.2d 885 (CA 5 1970) 8

Panola Land Buying Association v. Clark, 844 F.2d 1506 (CA 11 1988) 4

TABLE OF AUTHORITIES – Continued

Page

Richards v. Reed, 611 F.2d 545 (CA 5 1980)..... 4

Richardson v. Penfold, 900 F.2d 116 (CA 7 1990)..... 5

U.S. ex rel. Virani v. Jerry M. Lewis Truck Parts & Equipment, Inc., 89 F.3d 574 (CA 9 1996) ... 9, 10, 11, 12

Venegas v. Mitchell, 495 U.S. 82, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990)..... *passim*

White v. New Hampshire Dept. of Employment Sec., 629 F.2d 697 (CA 1 1980)..... 4

Willard v. Mitchell, 803 F.2d 526 (CA 9 1986) 5, 10

Youakim v. Miller, 425 U.S. 231 (1976) 13

STATUTES

Civil Rights Attorney's Fees Awards Act of 1976
42 U.S.C. § 1988..... *passim*

Civil Rights Act of 1964, Title VII
42 U.S.C. § 2000e-5(k) 4

False Claims Act
31 U.S.C. §§ 3729 et seq. 10

STATEMENT OF THE CASE

The instant Cross-Petition stems from a dispute involving the attorney's fees awarded by the district court to the prevailing plaintiffs in a case currently pending before this Court on a Petition for Writ of Certiorari, *City of Westminster v. Herr*, No. 99-465. Don Herr and Joe Wilson, who are the Cross-Respondents herein (referred to hereafter as "Plaintiffs") were prevailing parties in that action. In brief, Cross-Petitioner Davis, Reno & Courtney (referred to hereafter as "DR&C") who were counsel to Plaintiffs in the trial court, contend that the attorney's fees awarded by the district court should be paid directly to DR&C, rather than to the Plaintiffs who were the prevailing parties below. This argument was rejected by both the district court and the Ninth Circuit. Despite the overwhelming and consistent case authority which supports the rulings of these courts, DR&C seeks review by this court of the decision that fees are to be paid directly to the Plaintiffs. There is no reason why this Court should grant the Cross-Petition for Certiorari herein.

The material facts are straightforward. Since 1982, DR&C, a for-profit, private law firm, represented the Westminster Fire Fighters' Association, Local 2425, International Association of Firefighters, AFL-CIO (hereafter the "Union") on a variety of labor matters. The Union paid DR&C on a monthly basis and DR&C charged hourly fees for its work. There was no written fee agreement between the Union and DR&C. In 1992, when the City of Westminster began to threaten lay offs and staff reductions in the Fire Department, DR&C represented the Union in those matters. It continued to do so once the dispute moved into active litigation, in particular the

federal action, *Gilbrook v. City of Westminster*, D.C. No. Cv 94 2051 ("*Gilbrook*") (the related case, No. 99-465, pending in this Court) which was filed by DR&C in 1994 on behalf of individual firefighters and the Union. The action alleged First Amendment and equal protection violations by the City and certain City officials. Despite the change in the nature of their representation, DR&C did not memorialize their fee arrangement with respect to the litigation in a written agreement. DR&C continued to bill the Union every month for its fees, charged on an hourly basis. The Union paid what it could of these bills until its money ran out, in October, 1995.

At the time trial was set to begin, July, 1995, it was evident that the Union would not be able to finance the litigation. After discussions with the plaintiffs in the *Gilbrook* case, DR&C agreed to continue its representation of them through the end of the proceedings in the district court, even though the plaintiffs were no longer able to pay the mounting fees. Plaintiffs were the prevailing party in the trial court and the court awarded them attorney's fees in the amount of $977,166.68,[1] pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (hereafter "section 1988" or "the Act").[2] The district court denied DR&C's request that the fees be paid

---

[1] The Ninth Circuit reduced those fees, eliminating fees for time spent by DR&C on "post-verdict media and public relations activities." Appendix to Petition for Certiorari in Case No. 99-465 (hereafter "City's App.") at 79.

[2] Hereinafter, all references in the text to statutory provisions will be to volume 42 U.S.C. unless otherwise noted.

directly to them and not to the Plaintiffs. DR&C substituted out of the case once it went to the Ninth Circuit on appeal. To protect its interest in the attorney fees awarded by the district court, DR&C intervened in the federal appeal. The Ninth Circuit denied DR&C's appeal of the district court's ruling that the fee award be paid directly to Plaintiffs, and DR&C filed the instant Cross-Petition to seek review of that decision.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I. THE RULING THAT THE FEE AWARD SHOULD BE PAID DIRECTLY TO PLAINTIFFS IS CONSISTENT WITH VIRTUALLY ALL APPLICABLE AUTHORITIES, INCLUDING TWO DECISIONS OF THIS COURT.

A. This Court Has Held Twice That Section 1988 Fees Vest In The Prevailing Party.

Section 1988 provides in pertinent part that a court has the discretion to award "the prevailing party" in certain enumerated civil rights actions "a reasonable attorney's fee." 42 U.S.C. § 1988. This provision has been interpreted by the Supreme Court to entitle the party, not his counsel, to the discretionary fee. *Evans v. Jeff D.*, 475 U.S. 717, 730, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986) ("*Jeff D.*"), *Venegas v. Mitchell*, 495 U.S. 82, 87-89, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990) ("*Venegas*").

In *Jeff D.*, this Court pointed out that Congress' choice of words in the Act indicated Congress' intent that the right to attorney fees in certain civil rights actions

rests with the "prevailing party," and not its attorney. *Jeff D., supra,* 475 U.S. at 730-31, 106 S.Ct. at 1538-39. Accordingly in *Jeff D.*, this Court affirmed the discretion of a district court to approve a settlement which was conditioned on the plaintiff's waiver of the right to recover attorney fees from the defendant. This Court noted also that its reading of section 1988 was consistent with that of a majority of the courts of appeals in the country. *Id.*, 475 U.S. at 730, n.19, 106 S.Ct. at 1539, citing *Jonas v. Stack*, 758 F.2d 567, 570, n.7 (CA 11 1985); *Brown v. General Motors Corp.* 722 F.2d 1009, 1011 (CA 2 1983); *Cooper v. Singer*, 719 F.2d 1496, 1506-07 (CA 10 1983); *White v. New Hampshire Dept. of Employment Sec.*, 629 F.2d 697, 703 (CA 1 1980), *rev'd on other grounds*, 455 U.S. 445 (1982).

A few years later in *Venegas*, the Supreme Court considered whether section 1988 abrogated a contingent fee contract between a civil rights plaintiff and his counsel which would require that the plaintiff pay his counsel more than the statutory fee award recovered against the defendant. *Venegas, supra,* 495 U.S. at 84, 110 S.Ct. at 1681. In the opinion, this Court stated that "we have already rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff." *Venegas, supra,* 495 U.S. at 89, 110 S.Ct. at 1683, citing *Jeff D., supra.*[3] The Court reiterated that in *Jeff D.*, "we

---

[3] Other statutes with attorneys' fees provisions for "prevailing parties" have also been interpreted to require that the award of fees be made directly to the party, not its lawyer. *See, e.g., Panola Land Buying Assn. v. Clark,* 844 F.2d 1506 (CA 11 1988), (Equal Access to Justice Act); *Freeman v. B&B Assoc.*, 790 F.2d 145 (CA D.C. 1986) (Truth in Lending Act); *Richards v. Reed*, 611 F.2d 545 n.2 (CA 5 1980) (Title VII of Civil Rights Act, 42 U.S.C. § 2000e-5(k)).

recognized that as far as § 1988 is concerned, it is the party's right to waive, settle, or negotiate" its right to fees. *Id.*, 495 U.S. at 88, 110 S.Ct. at 1683. Thus, this Court upheld the contingent fee contract negotiated between plaintiff and counsel. *Id.*, 495 U.S. at 90, 110 S.Ct. at 1684.

Following *Venegas* and *Jeff D.*, appellate courts have adhered to the principle that it is the party, not his attorney, who is entitled to the section 1988 attorney fees award. *Collins v. Romer*, 962 F.2d 1508, 1516 (CA 10 1992); *Benitez v. Collazo-Collazo*, 888 F.2d 930 (CA 1 1989); *Willard v. Mitchell*, 803 F.2d 526, 527 (CA 9 1986).

B. Exceptions To The *Jeff D./Venegas* Rule Are Rarely Made In Section 1988 Cases, And There Is No "Conflict" Among The Circuits.

While there are examples of exceptions to the *Jeff D.* rule, they are rare and are based on the facts of the particular case. For example, in *Richardson v. Penfold*, 900 F.2d 116 (CA 7 1990), a section 1988 case, the court stated, "where, as in this case, the lawyer's *contractual entitlement is uncontested*," the fee award could be made directly to the lawyer. *Id.* at 117 (emphasis added). Even this apparent exception to the general rule derived from the principle that the fee entitlement belongs initially to the party, who was entitled to enter into a contract involving the fees.

In *Image Technical Service, Inc. v. Kodak*, 136 F.3d 1354, 1357-59 (CA 9 1998) ("*Image Tech.*"), an anti-trust case, neither the plaintiff, nor its counsel were awarded fees even though the plaintiff was the prevailing party, and the Clayton Act provides for a mandatory fee award to

the prevailing plaintiff, not his counsel. The court reluctantly reached this resolution of the case because Image Tech., the plaintiff, had been represented by counsel guilty of an ethical violation which prejudiced Kodak, the defendant. *Id.* at 1359. The court limited its deviation from the general rule to the "exceptional" circumstances of the case at hand. *Id.*

With respect to the instant action, there are no exceptional circumstances present which would warrant any deviation from the rule that section 1988 fees are paid directly to the party. The Plaintiffs had no contract whatsoever covering its fee arrangement with DR&C, let alone a contract entitling them to direct payment of any fees awarded. Indeed, Plaintiffs twice rejected DR&C's proposal that Plaintiffs assign any fees awarded to them. See *infra* § II.B. Case law on this issue could hardly be more clear – Plaintiffs are entitled to direct payment of the fees. There is no reason for this Court to review this action because there is little, if any, conflicting authority on this point. Nothing argued in DR&C's Cross-Petition is persuasive to the contrary.

C. DR&C's Cross-Petition Cites No Authority Which Conflicts With Precedents Holding That Section 1988 Fees Are To Be Paid To The Party, Not The Attorney.

DR&C's Cross-Petition extensively discusses several cases which preceded either the enactment of the Act, or this Court's decision in *Jeff D.* Cross-Petition at 7-12. These cases are wholly inapplicable since they predate the Act or this Court's holdings in *Jeff D.* and *Venegas* that

fees awarded under section 1988 are to be paid directly to the party, and not to the attorney. *Supra*, § I.A. Even so, DR&C has miscited them. One of these cases is *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) ("*Blum*"). Most of the other cases DR&C cited in this section of the Cross-Petition are discussed in *Blum*.

The issues before this Court in *Blum* were whether section 1988 fees awarded to nonprofit legal services organizations should be calculated according to prevailing market rates, and if so, under what circumstances, if any, could the fee award be adjusted upward. *Id.*, 465 U.S. at 889, 104 S.Ct. at 1544. The case did not discuss to whom the fees are paid at all, except to state that the Act "authorizes district courts to award a reasonable attorney's fee to *prevailing civil rights litigants*." *Id.*, 465 U.S. at 893, 104 S.Ct. at 1546 (emphasis added).[4] Nevertheless, DR&C confused statements by this Court to the effect that section 1988 counsel should be paid at the same market rates as are counsel in actions in which the clients pay the fees with the issue of to whom section 1988 fees are paid. *See, e.g.*, Cross-Petition at 12, citing out of context from *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee."

---

[4] Later, at page 16 of the Cross-Petition, DR&C erroneously cites *Blum* as authority for the following misstatement: "Congress clearly had class actions in mind when it adopted 42 U.S.C. § 1988." Although *Blum* itself was a class action, the pages cited by DR&C, 465 U.S. at 893-95, make no mention whatsoever of class actions; rather, this Court discussed legislative intent regarding whether section 1988 attorney's fees should be based on prevailing market rates or costs of litigation.

In this section of the Cross-Petition, DR&C also discussed *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 885 (CA 5 1970), and *Brandenburger v. Thompson*, 494 F.2d 885 (CA 9 1974), both of which pre-date enactment of the Act, and therefore cannot be germane to a discussion of to whom the Act authorizes payment of attorney fees. The same is true of *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974). Additionally, DR&C erroneously claimed the citation of *Davis* in the section 1988 legislative history was to signify Congressional intent that fees should be paid to counsel, not parties. Cross-Petition at 9. However, the plain language of the Act belies that theory; it awards fees to "prevailing parties." 42 U.S.C. § 1988. Thus, it is not surprising that the portion of section 1988's legislative history in which *Davis* was cited did not discuss the question of to whom the fees should be paid, but rather the appropriate standards for awarding fees under 1988. *See Blum, supra*, 465 U.S. at 893-94, 104 S.Ct. at 1547.

Finally, DR&C seriously misreads the decision in *Jeff D.*, arguing in several instances that it stands for specific propositions which it simply does not.[5] Cross-Petition at

---

[5] For example, DR&C completely misstates the content of footnote two at 475 U.S. 721. DR&C said that the Court stated in footnote two, "if there were to be a fee award notwithstanding the waiver in the settlement agreement, the fee award would 'inure' to the legal aid society rather than to the class of mentally and emotionally handicapped children." Cross-Petition at 14-15. However, in note two, the Court's observation was that any fees awarded to the prevailing party, a class composed of mentally and emotionally handicapped children, would benefit the legal aid society which brought the case on behalf of the class, although the individual attorney who worked on the case had entered private practice. This observation is a far cry from DR&C's interpretation.

14-15. The most serious misstatement made by DR&C is the following:

> [T]he Court stated on the other hand that under the facts and circumstances of that particular case [*Jeff D.*], a fee award should not be granted to the plaintiffs but rather to the organization whose attorneys represented them. Cross-Petition at 14.

No authority for this statement is cited. Nor could it be, since nowhere in *Jeff D.* does this Court make such a statement, or anything like it. As discussed above, this Court upheld the right of plaintiffs to waive attorney's fees entirely, thereby depriving their attorneys of any statutory fee award. *Jeff D., supra,* 475 U.S. at 731-32. Unable to find a true conflict in the authorities which govern the analysis of the question in the instant action, DR&C has tried to manufacture a conflict by citing inapplicable authorities and misstating leading cases. There is no call for this Court to review the result here. Payment of section 1988 attorney fees to Plaintiffs herein is entirely consistent with the body of law on the question.

II. DR&C'S RELIANCE ON *JERRY M. LEWIS* IS MISPLACED AND DOES NOT PROVIDE A REASON FOR REVIEW BY THIS COURT.

A. *Jerry M. Lewis* Arose under the False Claims Act, a Statute with an Entirely Different Purpose than the Fees Act.

In support of its incorrect argument that other court of appeal decisions conflict with that of the Ninth Circuit herein, DR&C relies heavily and mistakenly on *U.S. ex rel. Virani v. Jerry M. Lewis Truck Parts & Equipment, Inc.,* 89

F.3d 574 (CA 9 1996) ("*Jerry M. Lewis*"), a case arising under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3732. As it did in its briefing below, DR&C conveniently glosses over the myriad of distinctions between *Jerry M. Lewis* and the instant action.

Jerry M. Lewis involved a fee dispute which arose after Virani, a "whistle blower," settled his claim, brought under the FCA, that the Jerry M. Lewis company had defrauded the government. The settlement included a statutory fee award which the district court later ruled should be paid directly to Virani. Hall & Phillips ("H&P"), Virani's attorneys in the FCA action, appealed the payment of fees to Virani, claiming that the fees should have been paid directly to H&P. *Jerry M. Lewis, supra*, 89 F.3d at 576. The Ninth Circuit ruled in favor of H&P in their appeal. *Id.* at 580.[6] However, the *Jerry M. Lewis* decision was limited by the language of the opinion to the false claims, or *qui tam*, arena. *Id.* at 578. That *Jerry M. Lewis*'s holding is limited to FCA cases was signaled again by the Ninth Circuit in the recent *Image Tech.* decision. There the court referred to the issues in *Jerry M. Lewis* as "a similar dilemma in the context of . . . the False

---

[6] The Ninth Circuit managed to award the fees directly to H&P without directly contravening the rule established by *Jeff D.* and *Venegas* (which the Ninth Circuit followed in the section 1988 case, *Willard, supra*). The court accomplished this by agreeing that the "power" to seek fees rested with the party, but that once fees had been awarded, the "right" to be paid those fees vested in the attorneys. *Id.* at 578-79. This new formulation, however, was limited to cases under the FCA. *Id.* at 578.

Claims Act. . . . " and noted that *Jerry M. Lewis*'s conclusion was "under the FCA. . . . " *Image Tech., supra,* 136 F.3d at 1358-59.

In *Jerry M. Lewis* the court discussed its rationale for departing from the established rule. It pointed out that if fees awarded under the FCA did not go directly to the attorney, "a wrong would be perpetrated upon the government." *Jerry M. Lewis, supra,* 89 F.3d at 578. This is because the FCA sets up a reward and penalty scheme which involves payment by the wrongdoer to both the government and to the "relator" or whistleblower. The court posited that any monies paid to the relator as attorney fees which were not then paid over to his counsel would represent a windfall to the relator, and a commensurate loss from the government's share of the statutory penalty. *Id.* Obviously such a scheme is not at work in the instant case, or other section 1988 cases, and the U.S. government stands to lose no money when fees are paid directly to plaintiffs. There is no indication that *Jerry M. Lewis*'s deviation from the rule that federal statutory attorney fees are awarded to the prevailing party will, or should, have any impact on fee awards under section 1988.

B. Even If *Jerry M. Lewis* Were Applicable To A Section 1988 Fee Award, The Facts Here Are Distinguishable.

As pointed out above, *Jerry M. Lewis* was brought under the FCA, an entirely different statute than the Fees Act, and for that reason alone its holding should not be applied to the instant case. But moreover, in *Jerry M.*

Lewis, unlike here, there was a written retainer agreement in which H&P reserved the right to seek court awarded fees and costs; was assigned any amounts awarded as fees and costs; and retained "ultimate authority" over litigation and settlement decisions. *Jerry M. Lewis, supra*, 89 F.3d at 575-76, also at 580-82 (Concurring opinion suggests that existence of contractual assignment of fees, not fact that this was FCA case, should be determining factor.) In the instant action, DR&C conceded that its fee arrangement with plaintiffs was never put in writing. 2 FeesER 267.

Moreover, in August 1996, Herr and Wilson each rejected a contingency arrangement proposed by DR&C which expressly would have allowed the firm to intervene to seek a fee award on its own behalf. 2 FeesER 287, 291. Then, in January 1997, Herr and Wilson also rejected DR&C's request that they assign their rights to the section 1988 award to DR&C. 2 FeesER 288-89. By unequivocally rejecting DR&C's August 1996 and January 1997 proposed agreements, plaintiffs denied DR&C the very rights held by H&P in *Jerry M. Lewis*. This Court recognized in *Jeff D.* and *Venegas* that the prevailing parties have the right to assign, augment or waive statutory attorney fees by contract. Parties also have the correlative right *not* to make any such agreements with respect to the attorney fees awarded to them under section 1988. DR&C is not foreclosed from negotiating a settlement of its fee or litigating for a recovery in *quantum meruit*.

III. NONE OF DR&C'S REMAINING ARGUMENTS PRESENT A BASIS FOR THE GRANT OF THE CROSS-PETITION FOR CERTIORARI.

A. DR&C Present A Question For Review Which Was Never Raised In The Proceedings Below.

The fourth question presented in the Cross-Petition was whether, as a matter of "sound judicial administration," conflicts between clients and attorneys over statutory fee awards should be resolved by the same trial judge who heard the underlying case. *See* Cross-Petition, Questions Presented at *i*. DR&C never raised this issue in any of the proceedings below, nor do they suggest anywhere in the Cross-Petition that they did. Therefore, it is uncontroverted that this is raised here for the first time. "[O]rdinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Even if, for some reason, the Court would be willing to entertain this question, it does not raise a federal constitutional issue. Indeed, DR&C does not contend that it does. Rather, their argument discusses waste and inefficiency of judicial resources, plainly not a basis for exercise of this Court's discretion to hear this case.

B. DR&C's Final Argument Is Not Raised By The Questions Presented, Nor Was It Ever Raised Below.

Virtually out of nowhere, in the Cross-Petition, DR&C urges that the rule established by *Jeff D.* and *Venegas* that section 1988 fees vest in the litigant and not his counsel "offends ethical rules." Cross-Petition at 21.

This assertion is not encompassed by any of the questions presented in the Cross-Petition, nor was it ever raised anywhere below. That this Court's reading of Congressional intent regarding section 1988's authorization of payment of attorney fees to prevailing parties should be reviewed because it represents unethical fee-splitting is simply preposterous. Even on its face, the issue fails once subjected to the most basic legal analysis; any pronouncement of standards of ethical conduct for lawyers obviously gives way to a statutory or court created legal standard. Therefore, this argument by DR&C, fatally flawed and never before raised in this action, cannot provide a reason for this Court to grant review.

In sum, the Cross-Petition offers no legally sufficient, or coherent, basis for this Court to grant DR&C's request for a writ of certiorari. DR&C has offered no applicable authority to demonstrate that there is any conflict among United States courts of appeal on the federal question of to whom the right to attorney's fee awards vests under section 1988. DR&C's other arguments in favor of granting certiorari have never before been raised in this action, and they would not provide grounds for review even if they had.

CONCLUSION

For the reasons outlined above, cross-respondents request that this Court deny the Cross-Petition for Writ of Certiorari.

Dated: November, 1999

Respectfully submitted,

FOGEL, FELDMAN, OSTROV,
RINGLER & KLEVENS
A Law Corporation
LESTER G. OSTROV
JAN G. LEVINE
Counsel of Record